the Court rose, Mr. Tan for the Bank pointed out that the Debenture had in fact been deposited with the Registrar of this Court and Mr. Ong clarified his earlier submission that the Power of Attorney had not been registered, by stating that what he meant was that the Bank had not registered the instrument appointing Mr. Roland Choong as Receiver and consequently it was ineffective to create any power of attorney in him. Mr. Tan has produced the Debenture for inspection of this Court and I have noted that it was deposited on December 27, 1980.

But the Bank's instructions in writing appointing Mr. Roland Choong as Receiver on March 18, 1983 was only lodged with the Registrar of Companies pursuant to section 186 of the Act. After reciting that the Bank had appointed him to be a Receiver pursuant to the powers conferred upon the Bank by Clause 9 of the Debenture, the instrument reads:

"And we hereby appoint the said Roland Choong Shin Cheong to be our true and lawful substitute to execute in our name or his name any conveyance or assignment or other instruments and to deliver any deed or deeds and to effect any registration and to do all such other things as may be necessary to vest any property sold by the said Roland Choong Shin Cheong as such receiver in the purchases thereof."

It is this document which Mr. Ong now says is invalid for non-compliance with section 4 of the Ordinance.

The point raised is an interesting one because by Clause 13 of the Debenture, the Company only irrevocably appointed the Bank to be its attorney albeit with power to the Bank to substitute the Receiver for the time being in their place and stead to be attorney of the Company. In my view this document is also a general power which requires to be deposited in the manner provided by section 4 of the Ordinance. If Mr. Roland Choong wishes to execute any conveyance in the name of the Company, it follows that section 4 of the Ordinance must be complied with in regard to the instrument of his appointment.

The need for a dual compliance with section 4 by the deposit of the original Debenture and then the instrument appointing the Receiver could have been avoided if Clause 13 of the Debenture had been drafted to provide for the irrevocable appointment not only of the Bank but also of any Receiver appointed by it to be the attorney of the Company. Provided the formula in the instrument creating the power of attorney is so worded as to identify the donee of the power with due certainty, that would appear to be enough.

Looking again at the Orders which I have made, it does not appear to me necessary that there should be any variation of its terms. The Receiver can still sell and the Bank can execute the transfer. Of course, if the Receiver wishes to execute section 4 of the Ordinance must first be complied with. I order accordingly.

Order accordingly.

Solicitors : *Tan & Tan; L.M. Ong & Co.*

WOODLAND DEVELOPMENT SDN. BHD. v. CHARTERED BANK; P.J.T.V. & DENSUN (M) SDN. BHD. (Third Party)

[O.Cr.J. (Gunn Chit Tuan J.) July 6, 1985]

[Kuala Lumpur – Civil Suit No. 215 of 1975]

Banking – Banker collecting 'Account Payee' crossed cheque for a third party – Cheques crossed account payee in favour of plaintiffs – Whether Banker guilty of negligence – Bills of Exchange Act, 1949, s. 85.

Company Law – Doctrine of constructive notice – Ordinary directors having no authority from the company – Company not bound.

In this case Woodland Development Sdn. Bhd. (plaintiff in the present case) were payees of three cheques for $10,000, $50,000 and $10,000 respectively. The first cheque was crossed generally, the last two cheques were crossed with the words 'Account Payee'. One Kim Chean Han director of the plaintiff handed over these cheques to Richard Seow and Yap Yoke Min for opening an account in the name of the plaintiff in a Petaling Jaya Bank. All the three persons were directors of the plaintiff as well as P.J.T. V. & Densun (M) Sdn. Bhd. (third party). The third party had an account with the Chartered Bank, Petaling Jaya Branch – (defendants in the present case). The two directors, to whom the cheques were given instead of opening an account in the name of the plaintiff persuaded the manager of the defendant bank to collect the amount for the third party. The present action was brought by the plaintiff against the defendant Bank and the third party for conversion and alternatively for money had and received for their use.

Held: (1) the defendant bank was negligent in collecting cheques for the third party and were liable for conversion or alternatively for money had and received. The defendant bank was asked to return the said amount of $70,000 with interest to the plaintiff;

(2) the two directors of the third party had wrongly represented to the bank that being common directors of the plaintiff and the third party they had authority to collect the cheques for the third party. The third party was ordered to indemnify the defendants with an amount equivalent to that paid by the defendants to the plaintiff with costs.

Cases referred to:

(1) *Dey* v. *Pullinger Engineering Co.* [1921] 1 K.B. 77.
(2) *Royal British Bank* v. *Turquand* (1856) 6 E. & B. 327; 119 E.R. 886.
(3) *Mahoney* v. *East Holyford Mining Co.* (1875) L.R. 7 H.L. 869.
(4) *A.L. Underwood Ltd.* v. *Bank of Liverpool* [1924] 1 K.B. 775.
(5) *Alexander Stewart & Son of Dundee Ltd.* v. *Westminster Bank* [1926] W.N 271, C.A.
(6) *Kreditbank Cassel GMBH* v. *Schenkers* [1927] 1 K.B. 826.
(7) *Houghton & Company* v. *Nothard, Lowe & Wills* [1927] 1 K.B. 246.
(8) *B. Liggett (Liverpool)* v. *Barclays Bank* [1928] 1 K.B. 48.
(9) *Freeman and Lockyer* v. *Buckhurst Park Properties (Mangal) Limited* [1964] 2 Q.B. 480.
(10) *Importers Company Limited* v. *Westminster Bank Limited* [1927] 2 K.B. 297.
(11) *Akrokerri (Atlantic) Mines Limited* v. *Economic Bank* [1904] 2 K.B. 465.
(12) *National Bank* v. *Silke* [1891] 1 Q.B. 435, C.A.
(13) *Commissioner of Taxation* v. *English, Scottish and Australian Bank Ltd.* [1920] A.C. 683, 688.
(14) *Lloyds Bank* v. *E.B. Savory & Co.* [1933] A.C. 201, 228.
(15) *United Australia Ltd.* v. *Barclays Bank Ltd.* [1941] A.C. 1.
(16) *Official Assignee of the Property of Loh Chuk Poh, A Bankrupt* v. *The Overseas Chinese Bank Limited* [1934] M.L.J. 76.

CIVIL SUIT.

Ahmad Moosdeen for the plaintiff.
D.P. Naban for the defendants.
Porres P. Royan for the Third Party.

Cur. Adv. Vult.

Gunn Chit Tuan J. : The defendants in this suit, the Chartered Bank, are bankers carrying on business at their branch in Petaling Jaya, Selangor, whilst the plaintiff, Woodland Development Sdn. Bhd., is a locally-incorporated company. It was agreed and not disputed by the defendants that at all material times the third party, one P.J.T.V. and Densun (M) Sdn. Bhd., another locally-incorporated company, was a customer of the defendants.

On and about March 27, 1974, the defendants collected for the third party a crossed cheque No. 168813 for the sum of $10,000/- drawn on Malayan Banking Berhad, Sungei Patani branch, made payable to the plaintiff or bearer. On or about the same date the defendants collected for the third party a crossed "account payee" cheque No. 139080 for the sum of $50,000/- drawn on United Malayan Banking Corporation Berhad, Campbell Street, Penang branch made payable to the plaintiff. And on or about April 15, 1974, the defendants collected for the third party a crossed "account payee" cheque No. 135236 for the sum of $10,000/- drawn on Overseas Chinese Banking Corporation Limited, Penang branch made payable to the plaintiff or bearer. The defendants collected the proceeds of the said three cheques totalling $70,000/- and credited the same into the third party's account with it.

What was disputed was whether the defendants have converted the said cheques to their own use and wrongfully deprived the plaintiff of the same whereby it has suffered damage. Alternatively it was denied by the defendants that the said sums of $10,000/-, $50,000/- and $10,000/- are payable to the plaintiff as money had and received by the defendants to the plaintiff's use. In the further alternative it was also averred that the said cheques were collected for the third party, the customer of the defendants, in good faith and without negligence and that the defendants could rely upon the provisions of section 85 of the Bills of Exchange Act, 1949.

According to one Kim Chean Han (P.W.2), whose evidence I had to consider with caution because he was a common director of the plaintiff and the third party at the material times, the said cheques were handed by him to one Richard Seow (D.W.2) and Yap Yoke Min (D.W.3) with the request that they open an account in the name of the plaintiff in a Petaling Jaya Bank. Yap and Seow agreed and said that they would get a resolution prepared by the secretary for the plaintiff board's approval. There was no meeting of the plaintiff called to pass the resolution nor was there a circular resolution. After some time he checked up and discovered that no account had been opened for the plaintiff but the three cheques had been paid into the account of the third party. He enquired from Seow and Yap and was told by them that the said cheques were used to cover up some temporary overdraft account of the third party at the Chartered Bank, Petaling Jaya.

Under cross-examination P.W.2 explained that the said cheques were for the purchase of shares in

the plaintiff and that when those cheques were collected from the subscribers, the plaintiff did not have any particular project in mind. They were then thinking of housing development and did not think of purchasing a property in Cameron Highlands until later on. As far as he could remember the land in Cameron Highlands was purchased after July 1974. P.W.2 also confirmed that he did not go with Yap and Seow to the Chartered Bank when they paid in the said cheques, and denied that those cheques were collected by the defendants on the instructions of all three of them.

During re-examination P.W.2 explained further that the plaintiff only bought the Cameron Highlands property in June and a resolution was passed to that effect on June 15, 1974. He then corrected his earlier statement in examination-in-chief that no meeting of the plaintiff had been called to pass a resolution to open a bank account in the name of the plaintiff and stated that at a meeting of the directors in March it was resolved that an account for the plaintiff be opened at the Petaling Jaya Chartered Bank or the Petaling Jaya Hongkong Shanghai Bank. In answer to a question by the Court, P.W.2 stated that it was sometime in April that he found out that the said cheques had been paid into the account of the third party. After enquiring from Yap and Seow he went to see the manager of the Chartered Bank, Petaling Jaya, whom he thought was called Dr. Foley. He then approached Seow and Yap who promised to pay back the money.

The evidence of P.W.2 that he did not go to the Chartered Bank to present the said cheques together with the other two directors was supported by the evidence of one Ooi Kok Hai (P.W.1) who is now a director of the plaintiff but was not a director when the plaintiff was incorporated in 1973. That witness in answer to a question during cross-examination as to how he knew that the said cheques were presented for payment by Seow and Yap, explained that he found that out after he became a director in 1974 and had approached the bank to make some enquiries. He also confirmed the evidence of P.W.2 that there was no resolution of the plaintiff that the said three cheques be paid into the account of the third party.

A third witness called by the plaintiff was one Yeong Kok Chun (P.W.3) who was the company secretary of the plaintiff since 1973 and who produced its minutes book (D.1) as requested by the defence. That witness as well as the minutes in D.1 confirmed the evidence of P.W.2 that there were no discussions to buy a piece of land in Cameron Highlands in March 1974 and that it was only resolved at a meeting on June 15, 1974, that the plaintiff should buy a piece of land there. The evidence therefore tended to refute the allegations of the defence during the cross-examination of the plaintiff's witnesses that the said cheques were paid by the plaintiff into the third party's account with the defendants in March and April, 1974, as part purchase price of the land in Cameron Highlands.

At the close of the case for the plaintiff, and having heard and observed all the plaintiff's witnesses, including P.W.2, I accepted them as witnesses of truth.

The defence also called three witnesses, and its first witness was one Abdullah Din Mat Noor (D.W.1) who was the manager of the defendant's Petaling Jaya branch from about the middle of February, 1974. That witness explained that banks do not generally collect account payee cheques payable to others for their customers. He did not appear certain but said that as far as he could remember the second cheque was brought to him by "the three directors of P.J.T.V.". They had explained to him that they were common directors of the third party and the plaintiff and, as far as he could recall, they also gave him an assurance that should there be any claim against the bank, the third party would indemnify any loss. As he was satisfied and as an exceptional case he accepted that account payee cheque for $50,000/- for collection for the credit of the third party, but admitted that he could not remember details about the other two cheques.

Under cross-examination he admitted that the third party which has an account with their Petaling Jaya branch also had an overdraft with them. He also admitted that the plaintiff did not have an account with them nor has it any dealings with the defendants. D.W.1 then explained that the reason why banks do not accept third party cheques for their customers was because the proceeds therein belonged to the payees named in the cheques and that there was the danger that such proceeds would be paid into the wrong account. The witness was again not sure but thought that when the directors of the third party came to see him the cheques had already been endorsed and he could not remember whether he had also asked them to have the cheques endorsed from the plaintiff to the third party. In the case of the third cheque on page 3 of the agreed bundle of documents marked 'A' he

agreed that where the words "account payee only" have been written but the words "or bearer" were left alone, yet in such a case they should get the endorsement of the payee named in the cheque. He conceded that it was normal banking practice to have cheques payable to "account payee" endorsed by the payees named therein but said that in this case he was satisfied and accepted the said cheques as exceptions to the normal practice. D.W.1 also said that although they were common directors of the plaintiff and the third party it did not cross his mind to ask them to open an account for the plaintiff first. After he was shown the minutes of the plaintiff dated March 26, 1974, in D.1 he agreed that two of the cheques were presented to his branch the very next day but claimed that there was no way to confirm whether they were common directors of both companies. He did not ask them for any document but conceded that he could have done so. D.W.1 then told the court that he took over officially as branch manager from a Mr. Foley in mid-March 1974. He could not remember the exact date Mr. Foley left the Petaling Jaya branch and conceded that he could not challenge P.W.2's evidence that the latter had gone to see Mr. Foley. But when challenged again he did not agree if P.W.2 had said that he did not come to see him when the said cheques were presented to his branch.

The second witness for the defence was Seow Tai Sim (D.W.2) who was also a common director of the plaintiff and the third party at the material times and whose evidence should therefore be treated with caution. He claimed that three of them went to the bank to seek assistance to clear the said cheques and that it was P.W.2 who had requested that the cheques be paid into the account of the third party so that the money could be sent early to the vendor of the land. Although they met the bank manager yet he was not very sure but thought that the man they met was Encik Abdullah.

During cross-examination D.W.2 admitted that it was he who went to the bank to present the first and second cheques. They asked the bank to do them a favour but could not remember which cheque it was that they had asked the bank for assistance. When asked why an account was not opened for the plaintiff he said that they did not do so "because both companies were managed by Kim" and that he had paid the said cheques into the third party's account at the request of Kim. He did not blame anybody and knew that Encik Abdullah was doing them a favour by paying the cheques into the third party's account. When he was shown a copy of a resolution of the third party to sell the land in Cameron Highlands to the plaintiff (P.5) he confirmed that that was the resolution but said that he could not remember the date when it was passed, although a perusal of P.5 would show that the resolution is dated April 22, 1974, *i.e.*, after the said cheques had been paid into the third party's account. D.W.2 claimed that he was never at the first director's meeting of the plaintiff; but the attendance sheet of the board meeting of the plaintiff held on March 26, 1974, in D.1 bears his signature similar to that of his shown on P.5. Finally when he was asked to explain why the cheques have been paid into the third party's account he said that the reason was because the plaintiff did not have a bank account.

The last witness for the defence was Yap Yoke Min (D.W.3). He said briefly in examination-in-chief that because the plaintiff had not opened a bank account so they requested the manager of the Chartered Bank to do them a favour by paying the cheques into the third party's account. Like D.W.2 although he went to the bank yet he was not too sure whether the man he met was Encik Abdullah. As he was also a common director of both the plaintiff and the third party at the material times his evidence must be treated with caution too.

Under cross-examination D.W.3 admitted that he went to the bank to present the said cheques but then without appearing too certain he said that he thought the three of them went together. He also thought that they went to enquire whether the cheques could be cleared and Encik Abdullah agreed to clear them. That witness also said that he could not remember if he attended the first board meeting of the plaintiff after D.1 was shown to him. Here again an examination of the relevant attendance sheet in D.1 shows his signature on it similar to that of his on P.5.

Having seen and heard the three defence witness and having considered their evidence I was not prepared to accept D.W.1's evidence that P.W.2 was present when the said cheques were presented to the defendants for collection, nor did I find D.W.2 and D.W.3 to be witnesses of truth. I found on the balance of probabilities on the evidence, both oral and documentary, adduced in this case that only D.W.2 and D.W.3 went to the defendants' bank at Petaling Jaya where they met D.W.1 who agreed to do them a favour by accepting the second cheque for $50,000/- shown on

page 2 of the agreed bundle of documents marked 'A' for collection for the third party. It was D.W.2 and D.W.3 who had presented the other two cheques for $10,000/- each shown on pages 1 and 3 of the agreed bundle of documents marked 'A' which were accepted by some officers of the defendants for collection and payment of the proceeds into the account of the third party. Neither Mr. Foley nor any other officers of the defendants who could have given evidence of the circumstances under which those two cheques were accepted for collection were called by the defence. I also found that when D.W.2 and D.W.3 presented the said cheques for payment into the account of the third party, they did not have the authority of the true owner of the said cheques, that is, the plaintiff, to do so. In fact the minutes of the meeting of the plaintiff's board of directors held on March 26, 1974, show that "it was resolved that the Chartered Bank at Petaling Jaya and the Hongkong & Shanghai Banking Corporation at Petaling Jaya, be appointed bankers to the company and that all documents and cheques drawn on the company's account be signed by Mr. Kim Chean Han and Mr. Yap Yoke Min and countersigned by Mr. Ooi Kok Hai." However, instead of proceeding to open a bank account for the plaintiff at the Chartered Bank or the Hongkong Shanghai Bank at Petaling Jaya in accordance with the said resolution of the plaintiff's board of directors, D.W.2 and D.W.3 after receiving the said cheques from P.W.2 went to the defendants the very next day and managed to persuade D.W.1 and some other officers of the defendants to collect and pay the proceeds of the first two cheques into the account of the third party. The third cheque was, it would appear from it, accepted for collection by the defendants' officers on April 15, 1974.

Mr. Naban, counsel for the defendants, referred to the following passage in the chapter on Conversion – Money Had And Received at pages 277 and 278 of *Paget's* Law of Banking (9th. Edition):-

"Conversion in relation to banking concerns mainly the collecting banker. An action for conversion usually raises the alternative claim for money had and received which is akin to money paid by mistake; and the two may, perhaps, properly be treated together.

Wherever conversion lies, and money has been received for the negotiable instrument converted, the true owner may waive the wrong and sue for money had and received to his use. The claims are usually joined in the alternative, and this is the form in which the action is couched against a banker who has collected a cheque for someone without title. The joinder of a claim for money had and received does not operate as a waiver of the wrong so as to prejudice the claim in conversion, but leaves the plaintiff free to recover on either ground; and defences appropriate to each are open to the defendant. The action for money had and received is not merely an alternative to conversion, or dependent on the existence of a conversion; it is an independent and widespreading form of action, and lies in many cases where conversion would not, as for the recovery of money paid for a consideration which has failed or under a mistake of fact."

He also referred to the following passage on "Money Had And Received" on page 193 of *Holden* on Banker and Customer (Volume I):-

"A person whose goods have been wrongfully converted by another person has been able, for very many years, to sue for the proceeds as 'money had and received to his use, i.e., instead of suing for damages for conversion."

And then, rather surprisingly, or unless I have misunderstood him, counsel stated that the plaintiff must prove conversion before succeeding in an action for money had and received against a collecting bank. He then submitted that the only issue in this case was whether the defendants had authority from the plaintiff, and that if the plaintiff had given the defendants authority then the action for conversion failed. Counsel also submitted that a question which the court had to consider was whether those three directors had the authority of the plaintiff when they went to the bank. And he referred to the following *dictum* in the judgment of Bray J. in *Dey* v. *Pullinger Engineering Company*:(1)

"If, on the other hand, as in the case of *Royal British Bank* v. *Turquand* (1856) 6 E.&B. 327, the directors have power and authority to bind the company, but certain preliminaries are required to be gone through on the part of the company before that power can be duly exercised, then the person contracting with the directors is not bound to see that all these preliminaries have been observed. He is entitled to presume that the directors are acting lawfully in what they do."

It was then the submission of Mr. Naban that the bank manager was entitled to presume that the three directors were acting lawfully in what they did.

Before considering that brief submission of counsel based on the *dictum* of Bray J. in *Dey's* case, I ought to pause here to consider briefly the law relating to the doctrine of constructive notice in relation to delegated authority. That doctrine was that since the memorandum and articles of a company are public documents and open to public inspection, any one who had dealings with the company must be taken to have notice of the contents of those documents whether he had read

them or not. Because that doctrine would have been unworkable if applied to its logical conclusion, it was mitigated by the rule in *Royal British Bank* v. *Turquand*[2] which provided that third parties who had dealings with a company need not enquire into the regularity of what Lord Hatherley called in *Mahoney* v. *East Holyford Mining Company*[3] "the indoor management" of the company and may assume that all is being done regularly. But the rule in *Turquand's case* was later subject to exceptions in a series of cases most of which were concerned with banks. Thus it was held that a bank was not protected where it deals with the agent as a principal and not as an agent (*A.L. Underwood Limited* v. *Bank of Liverpool,*[4] *Alexander Stewart & Son of Dundee Limited* v. *Westminster Bank*[5]). It was also held that a bank is not protected where the indorsement is a forgery (*Kreditbank Cassel Gmbh.* v. *Schenkens*[6]), or where the bank has no knowledge of the existence of a power of delegation in the articles of a company (*Houghton & Company* v. *Northard, Lowe & Wills*[7]) or where the bank is put upon inquiry (*B. Liggett (Liverpool) Limited* v. *Barclays Banks*[8]). The rather confused state of the authorities had been dispelled by the judgment of the Court of Appeal in *Freeman and Lockyer* v. *Buckhurst Park Properties (Mangal) Limited*[9] where the articles of the company authorised the appointment of a managing director, but no such appointment was made. The board of directors nevertheless allowed one of the directors called Kappor to act as managing director in carrying on the business of the company. It was held that the directors had by their conduct held out their colleague as managing director and, since the act he had undertaken on behalf of the company was within the ordinary ambit of the authority of a managing director, the company was bound.

The authority of an agent may be however an actual authority or an ostensible or apparent authority. And on the distinction between 'actual' and 'apparent' or 'ostensible' authority Diplock L.J. (as he then was) said in *Freeman & Lockyer's* case that

> "An 'actual' authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties . . . . To this the contractor is a stranger . . . . An 'apparent' or 'ostensible' authority . . . is a legal relationship between the principal and the contractor created by representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger."

Having analysed the relevant law His Lordship then summarised it by stating four conditions which must be fulfilled to entitle a third party whom he called "a contractor" to enforce against a company a contract entered into on behalf of the company by an agent who had not actual authority to do so. It must be shown:

(1) that a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor;

(2) that such representation was made by a person or persons who had 'actual' authority to manage the business of the company either generally or in respect of those matters to which the contract relates;

(3) that he (the contractor) was induced by such representation to enter into the contract, that is, that he in fact relied upon it; and

(4) that under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent.

As a result of that decision the present law is that where the board of a company permits its agent to act in the way in which he did and his act was not *ultra vires* the company, then any person dealing with the agent can rely on that apparent authority and is entitled to assume that the company was bound by the agent's representation.

In so far as *Dey* v. *Pullinger Engineering Company* is concerned, the articles of association of the company in that case empowered the directors to authorize one of their body as managing director to draw bills of exchange on behalf of the company. The managing director drew a bill on behalf of the company without having in fact received any authority from the directors to draw bills. In an action on the bill against the company as drawers, it was held that the managing director, in drawing the bill on behalf of the company was a person acting under its authority, and that the company was liable. As by the constitution of the company the managing director might have been authorized to draw the bill, a person taking the bill in due course was entitled to assume that he had

authority in fact. In our present case, although estoppel was not pleaded in the statement of defence, it could nevertheless be noted that the articles of association (a copy of which was exhibited with the minutes of the meeting of the board of directors of the plaintiff held on March 26, 1974) empower the directors to appoint one of their body as managing director, but at the material times when the said cheques were paid into the account of the third party, no one had yet been appointed or was held out by the plaintiff to be its managing director. In any case the facts based on the evidence in this suit are different and can be distinguished from the facts in *Dey's* case as well as in *Freeman & Lockyer's* case in that when two of the directors, neither of whom was the managing director and who did not have the authority of the board, went to the defendants and tried to pay the said cheques into the account of the third party, the manager and the officers of the defendants who were strangers to the plaintiff which has never had any dealings with the bank, were not, in my view, entitled to presume on a mere oral representation that D.W.2 and D.W.3 were acting lawfully in paying the plaintifff's cheques into the third party's account. Moreover the manager and the defendants' other officer would, or, if they had examined the said cheques, should have noticed that the said cheques were endorsed for the third party and not for the plaintiff which was the payee of the said cheques. As such D.W.1 and the officers of the defendants should have been put on enquiry and should not have assumed that D.W.2 and D.W.3 had the authority of the plaintiff to pay the said cheques into the account of the third party.

Another point, which was not directly relevant to the issues in this suit, made by Mr. Naban was that the cheques which included the words "account payee" within or adjacent to the two parallel lines were not invalidated. He referred to the following *dictum* of Atkin L.J. in *Importers Company Limited* v. *Westminster Bank Limited*:[10]

"... one knows very well that cheques are occasionally drawn marked 'Account payee' and sent to a person who has no banking account. I do not agree that those cheques are of no value to that person. I see no reason why such a person should not request some one who has a banking account to present and get the cheque cleared for him."

With respect one cannot but agree with the above *dictum* as the words "account payee" are not an addition authorized by statute and are "a mere direction to the receiving bank as to how the money is to be dealt with after receipt" (*Akrokerri (Atlantic) Mines Limited* v. *Economic Bank*[11]). The addition of those words to the crossing does not prevent the cheque from being transferable (*National Bank* v. *Silke*[12]). I think that the point which counsel was trying to make was that an "account payee" cheque could be paid into another person's account, but he might have overlooked that Atkin L.J. also said in the *Importers Company's* case that there is a duty upon the bank which takes a cheque marked "account payee" to be cleared through another person's account "to see that, in fact, they are collecting the money for the account of the payee, and that the proceeds, when received, will go to the payee." And that was what the defendants did not do in this case.

As for the alternative claim for money had and received Mr. Naban submitted briefly that it was the instructions of the directors to collect the said cheques and to credit the third party's account and that the defendants were therefore not liable. On the issue of negligence for the purposes of section 85 of the Bills of Exchange Act which is as follows:

"(1) Where a banker, in good faith and without negligence –

(a) received payment for a customer of an instrument to which this section applies;

(b) having credited a customer's account with the amount of such an instrument, receives payment thereof for himself; and the customer has no title, or a defective title, to the instrument, the banker does not incur any liability to the true owner of the instrument by reason only of having received payment thereof.

(2) This section applies to the following instruments, namely –

(a) cheques;

(b) ...

(c) ...

(3) A banker is not to be treated for the purposes of this section as having been negligent by reason only of his failure to concern himself with absence of, or irregularity in, indorsement of an instrument."

it was the submission of counsel that in collecting the bearer cheque for $10,000/- there was no negligence because a bank could collect it for any bearer of the cheque who brings it. As regards the other two cheques counsel referred to the following passage in the Privy Council case of *Commissioners of Taxation* v. *English, Scottish and Australian Bank Ltd*:[13]

"The test of negligence is whether the transaction of paying in any given cheque, coupled with the circumstances antecedent and present, was so out of the ordinary course

that it ought to have aroused doubts in the bankers' mind, and caused them to make inquiry."

He then conceded that there was negligence in respect of the collection of the two "account payee" cheques.

Mr. Moosdeen, counsel for the plaintiff, submitted that one of the issues concerning conversion was who was the owner of the three cheques? Secondly, whether the plaintiff's directors had authority to pay the cheques into someone else's account? The third issue involved section 85 of the Bills of Exchange Act, 1949, and lastly there was the alternative claim of the plaintiff for money had and received.

As to who was the true owner of the said cheques, counsel referred to a paragraph in *Paget's* Law of Banking (9th edition) at page 198 on the meaning of "the true owner" of a cheque, and pointed out that all the three cheques in this case were made out to the plaintiff who was therefore the true owner. He also pointed out that those cheques were presented to the defendants in March and April 1974 whilst the minutes of the plaintiff to buy the property in Cameron Highlands were only passed in June 1974. He also stated that the resolution of the third party (P.5) to sell the said land to the plaintiff was passed on April 22, 1974, but those three cheques were presented for collection for the third party even before April 15, 1974. The minutes of the first meeting of the plaintiff on March 26, 1974 did not mention the purchase of the land and the first two cheques were presented and cleared on March 27, 1974. Counsel also pointed out there is no averment in the statement of defence or in correspondence alleging that the money in the said three cheques were taken for the purchase of the said land, and submitted therefore that the suggestion of the defence that the cheques were taken for the price of the land could not stand.

On conversion Mr. Moosdeen referred to *A.L. Underwood* v. *Bank of Liverpool*, which he submitted was a case very similar to the present one. In that case one U, a merchant, had a banking account at the defendant's bank. Later he converted himself into a limited company, all the shares being allotted to himself except one, which was held by his wife. A debenture in the form of a floating charge over the assets of the company was issued to a creditor of U as a security for his debt. By the articles of the company U was appointed sole director and after formation of the company he kept all his private banking account with the defendants as before. The company had a separate account, which was kept at another bank, but the defendants had no knowledge of that fact. U as sole director became possessed of a number of cheques, some crossed and others uncrossed drawn in favour of the company. He endorsed them and paid them into his own account with the defendants, instead of paying them into the company's account with the other bank. The defendants, without enquiring whether the company had a separate banking account, collected the cheques and credited U with the proceeds, which he misappropriated. When doing so they treated him as being identical with the company, and overlooked the materiality of the cheques being drawn in the company's favour and not in his. In an action brought by the company on behalf of the debenture holder for conversion of the cheques, it was held, *inter alia,* by the Court of Appeal that the defendants were precluded from setting up that U, when paying the cheques into his own account, was acting within the scope of his apparent authority as agent of the company, upon two grounds: first, that the act of an agent paying his principal's cheques into his own account was so unusual as to put them on inquiry, that they ought to have enquired whether the company had a separate banking account, and, if it had, why the cheques were not paid into that account, and that their failure to make that inquiry amounted to negligence; and secondly that U when paying in the cheques did not purport to act as the Company's agent, but as being himself the company, and that the defendants so treated him. Mr. Moosdeen referred, in particular, to the following passage in the judgment of Scrutton L.J. in that case:

> "... Lord Chelmsford, however, in *Mollins* v. *Fowler* (L.R. 7 H.L. at p. 795) states the position thus: "Any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion." Now bankers who collect borrow from their customers the proceeds when collected, and in collecting exhaust the operation of the cheque. These operations have been held to be conversion in such cases as *Kleinwort* v. *Comptior National d'Escompte de Paris* [1984] 2 Q.B. 157; *Arnold* v. *Cheque Bank* 1 C.P.D. 578 *Fine Art Society* v. *Union Bank of London* 17 Q.B.D. 705; and by Lord Reading in this Court in *Morison* v. *London Country and Westminster Bank* [1914] 3 K.B. 356, 384. Unless therefore the defendant bank can show some excuse in law, they are guilty of conversion."

Counsel also referred to the following passage in the judgment of Atkin L.J. in that case:

> "... The story, unfortunately, is not uncommon. An official of a limited company has fraudulently taken

cheques belonging to the company, which he had authority to indorse, paid them in to his own bank, and converted the proceeds. The cheques were drawn in favour of the company, some were not crossed, some were crossed and some marked "Not negotiable". The bank are sued by the company for the conversion of the cheques, and in my opinion are liable."

Counsel then also pointed out that the money of the plaintiff was used to enable the third party and not the plaintiff to buy the land in the first instance. He contended that the directors had no right to use the plaintiff's money to finance the purchase of the land by the third party, and stated that no director has authority to use the company's money to defraud it and that it made no difference whether the directors were acting singly or collectively. Counsel also contended that the plaintiff was not a customer of the defendants and that therefore the manager of the defendants was doing a favour for the directors and not for the plaintiff.

On section 85 of the Bills of Exchange Act, 1949, counsel stated that the burden of proof was on the defence and he relied on the following passage in the judgment of Lord Wright in *Lloyds Bank* v. *E.B. Savory & Co.*[14] in which His Lordship referred to section 82 of the former U.K. Bills of Exchange Act, 1882 which is similar to section 85 of our own Bill of Exchange Act, 1949:

"... The only question is whether they establish that they handled the cheques without negligence. Unless the appellants can establish that they acted without negligence, they, like other bankers in a similar position, are responsible in damages for conversion if their customers had no title or a defective title. In an ordinary action in conversion, once the true owner proves his title and the act of taking by the defendants, absence of negligence or of intention or knowledge are alike immaterial as defences. Section 82 is therefore not the imposition of new burden or duty on the collecting banker, but is a concession affording him the means of avoiding a liability in conversion to which otherwise there would be no defence. As it is for the banker to show that he is entitled to this defence, the onus is on him to disprove negligence. And just as in an action in conversion was only possible because of want of ordinary prudence on the part of the true owner, so that averment is equally immaterial if the issue arises under section 82."

I would pause here to note that the above case shows that a bank is liable to the true owner if it collects a cheque with a forged indorsement, or to which the customer has no title, and if it fails to prove that it had acted without negligence.

Counsel also referred to the following dictum of Lord Atkin in *United Australia Ltd.* v. *Barclays Bank Ltd.*:[15]

"In these days every bank clerk sees the red light when a company's cheque is endorsed by a company's official into an account which is not the company's."

and stated that if a cheque is payable to a company but the words "or bearer" have not been crossed out, yet the bank clerk concerned should have been put on inquiry. Counsel then pointed out that the defence had not adduced any evidence of the circumstances under which the first and the third cheques were collected. And lastly, on interest counsel stated that the plaintiff have been kept out the money since 1974 and should be awarded interest with effect from April 1974.

Apart from the English authorities referred to above, reference ought to be made to our former Court of Appeal (Straits Settlements) case of *The Bankrupt* v. *The Overseas Chinese Bank Limited*,[16] which is a decision of more than half a century. In that case a crossed cheque for the purpose of paying a dividend in bankruptcy was fraudulently obtained from the Official Assignee. The cheque was signed by the Colonial Treasurer, countersigned by the Colonial Secretary and further countersigned by the Official Assignee. By means of a forged endorsement the cheque was negotiated and paid. The Official Assignee brought an action against the collecting bank for damages for conversion. The bank pleaded among other things that the Official Assignee was not the true owner of the cheque in as much as he was not the drawer. It was held by the Court of Appeal, upholding in part the decision of Mills J., that the Official Assignee was not the drawer nor was he in the position of a drawer in the mercantile sense. Nevertheless, the Court of Appeal held that the right to possession of and the property in the cheque was vested in the Official Assignee and that he was therefore entitled to maintain an action for conversion against any person who, however innocently, had obtained possession of the cheque and disposed of the proceeds. Whilst considering the question of who may sue for conversion of the cheque Huggard C.J. at page 80 said:

"It seems to me that on these facts the right to possession of and the property in this cheque are still vested in the Official Assignee and that he is therefore entitled to maintain an action for conversion against any person who, however innocently, has obtained possession of the cheque and has disposed of the proceeds thereof, whether for his own benefit or that of any other person . . ."

Bearing in mind the relevant legal principles established in the cases referred to above and applying them to the facts of this case found by me on the evidence adduced, it was my judgment that the true owner of the said cheques was the plaintiff

and that D.W.2 and D.W.3 did not have the authority of the plaintiff when they presented those cheques to the defendants' branch manager and other officers for collection and for payment of the proceeds therein into the third party's account. I therefore held that in the circumstances of this case the defendants were liable in damages for conversion of the said cheques. Alternatively, I held that the plaintiff was also entitled to repayment of the said sums of $10,000/-, $50,000/- and $10,000/- as money had and received by the defendants to its use, because it has been conceded by the defence that there was negligence in respect of the collection of the two account payee cheques. As regards the third cheque *i.e.* the bearer cheque I agree with counsel for the plaintiff that no evidence has been adduced to show the circumstances under which that cheque was received for collection and the defendants have therefore failed to prove that it had acted without negligence and were not protected under section 85 of the Bills of Exchange Act and were therefore also liable. I therefore ordered the defendants to pay the plaintiff $70,000/- together with interest at the rate of 8% per annum on $60,000/- with effect from March 26, 1974, and 8% per annum on $10,000/- with effect from April 14, 1974, and costs. Finally I also ordered the third party to indemnify the defendants with an amount equivalent to that paid by the defendants to the plaintiff and costs.

Order accordingly.

Solicitors : *Chan Moosdeen & Partners; Skrine & Co.; Shook Lin & Bok.*

BRUNEI REPORT

WONG SIEW SING v. BAWAI BIN MUNJIL

[O.C.J. (Power J.) April 4, 1985]

[Bandar Seri Begawan – Suit No. 23 of 1984]

Contract – Sale and purchase of land with buildings – Receipt of $400,000 for no payment – Estoppel – Non-payment by defendant – Notice of termination – Rescission – Counterclaim for specific performance – Credibility of witnesses.

The plaintiff in this case claimed for a declaration that she has effectively rescinded the agreement dated January 30, 1983 ("the first agreement") which she entered into with the defendant relating to the sale to him of 12 units of industrial buildings erected on her land Lot 9452, situated at Sungai Meng lait, Gadong, some 4 k.m. from Bandar Seri Begawan.

On January 10, 1980, the plaintiff received permission from the Competent Authority, to erect the 12 units of buildings. On May 26, 1982, the Authority, however, notified her that her construction of a bridge and buildings in respect of the land was illegal and she was required to clear the site within 60 days. She did not comply with the notice and in fact carried on building the units. The authorities have not taken any further action under the notice. In January 1982, the plaintiff obtained a loan of B$600,000 from a Bank to finance the building of the units, secured partly by a charge over the land. The loan was insufficient and on August 8, 1982 the plaintiff, who acted all the time under the direction of her husband, sold one unit of the building. By December 1982, the Bank was pressing the plaintiff for repayment of the loan and she had to sell 2 more units in an attempt to raise money to pay the Bank. But this attempt through one Datuk Carvalho and one Major Hussin to raise the money was unsuccessful. The husband said at this point the defendant came on the scene. So on January 20, 1983 the plaintiff entered into a Sale and Purchase Agreement with the defendant and, although he paid no money, she issued him with a receipt for $400,000. The defendant could not get a loan and nothing was paid. The defendant, however, said he paid the sum of $400,000 in cash. The husband said that on January 27, 1983 the defendant told him the defendant had more chance to raise a loan if the plaintiff sold all 12 units to him. Thus the first agreement was entered into between the plaintiff as vendor and the defendant on January 30, 1983 for the price of $4,000,000. The husband said the defendant was in doubt whether he would be able to raise the $4,000,000 and that a second agreement, also dated January 30, 1983 was signed, which gave 4 units to the plaintiff in lieu of the payment of $1,350,000. It was indisputable that the defendant did not pay $750,000 to the Bank. Eventually, as the defendant could not raise the money, the plaintiff on April 7, 1983 wrote to the defendant terminating the first agreement, *i.e.*, the sale and purchase agreement of January 30, 1983. The defendant, however, said that on April 9, 1983 the husband told him that the letter of termination of April 7, 1983 was cancelled and that they would "carry on according to" the agreement of January 30, 1983. The defendant counterclaimed for specific